

1. 1500254 (Migration) [2016] AATA 3140 (27 January 2016)
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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Padmavati Yanmandra

CASE NUMBER: 1500254

DIBP REFERENCE(S): CLF2012/175351 CLF2012/175351
CLF2015/2235

MEMBER: Kira Raif

DATE: 27 January 2016

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Spouse) visa:

- Public Interest Criterion 4020 for the purposes of cl.801.226 of Schedule 2 to the Regulations.

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Statement made on 27 January 2016 at
9:54am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 December 2014 to refuse to grant the applicant a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
5. The applicant applied for the visa on 23 August 2012. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.801.226 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the delegate was not satisfied the applicant met Public Interest Criterion 4020. The applicant seeks review of the delegate's decision.
6. The applicant appeared before the Tribunal on 27 January 2016 to give evidence and present arguments. The Tribunal also received oral evidence from .The applicant was represented in relation to the review by her registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

RELEVANT LAW

8. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.801.226 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
9. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B).
10. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act. In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the

reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.

11. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
12. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

13. The applicant made the application for the Partner visa and completed form 47SP. She stated on that form that she had never been married before. She declared a de facto relationship to Bhushan Kamavisdar, stating that relationship commenced in March 2004 and ended in February 2008. The applicant did not declare any children from that relationship.
14. The applicant enclosed with her Partner visa application a marriage certificate showing her marriage to the sponsor. The applicant also enclosed with her application a copy of her passport, issued in 2007, which identifies Mr Kamavisdar as her spouse.
15. In March 2014 the Department received an allegation that the applicant was married to Mr Kamavisdar in India and had a child from that relationship. Departmental systems indicate that when the applicant sought the Student visa in 2008, she declared Mr Kamavisdar as her spouse and stated that she had a child from that relationship.
16. In her conversation with the delegate on 4 June 2014 the applicant stated that she was never validly married to Mr Kamavisdar because the families had a dispute about a dowry and the marriage did not go ahead. She said there were no children from that relationship. In her written submission to the Tribunal the applicant also explained that there was an engagement arranged by respective families but she never married Mr Kamavisdar. The applicant claims that when she completed the application form, there was no option of referring to 'engagement', which is why she referred to having a de facto relationship with Mr Kamavisdar and the applicant claims she explained her situation to the delegate who granted the temporary visa.
17. The Tribunal finds that evidence unconvincing. The Tribunal places significant weight on the fact that the applicant's passport identifies Mr Kamavisdar as her spouse. On 21 August 2014 the Department of Immigration received advice from its New Delhi office that in order to have a spouse's name added to a passport, evidence of a valid Hindu marriage would have to be provided and without a valid marriage certificate, it is not possible to include a spouse's name on a passport. In her written evidence to the Tribunal the applicant claims the passport was arranged by an agent and the marriage certificate would not have been provided. In her oral evidence to the Tribunal the applicant stated that the application for the passport was 'manual' and the authorities did not ask for the marriage certificate before issuing the passport. The Tribunal is mindful that this document contradicts the information provided to the Department by the local authorities. The Tribunal finds the evidence of the local

authorities to be more persuasive. The Tribunal is not satisfied that the Indian authorities would state that Mr Kamavisdar was the applicant's spouse on the mere promise of a marriage and in the absence of probative evidence of a valid marriage. The Tribunal is of the view that the reference in the applicant's passport to Mr Kamavisdar being her spouse is a strong indication that the applicant and Mr Kamavisdar were validly married.

18. The Tribunal also places weight on the fact that the applicant identified Mr Kamavisdar as her spouse in the Student visa application. The applicant suggested to the delegate that this was on the basis of a future marriage as she expected him to join her in Australia. She informed the Tribunal that she could not refer to engagement, so she referred to the de facto relationship. The Tribunal does not accept that evidence. The Tribunal notes that the Student visa application form does include a reference to being married, engaged or in de facto relationships, among others. In the Tribunal's view, if the applicant was not married but was only engaged to Mr Kamavisdar and wanted to refer to being engaged, she would have done so. A spouse is a defined term and implies either a valid marriage or a de facto relationship, not a mere promise of a marriage. The applicant refers to being well educated and also to having an agent in India who assisted with the paperwork. The Tribunal does not accept that the applicant and the agent made the mistake of referring to a non-existing spousal relationship with Mr Kamavisdar. The Tribunal does not accept that the applicant would have referred to Mr Kamavisdar as her spouse on the basis of a mere intention of a future marriage or that she provided false information in the application due to the pressure from others.
19. The applicant informed the Tribunal in oral evidence that the circumstances in India are different and she was required to do what was needed by her parents and she was not allowed to make any decisions. The Tribunal finds that evidence unconvincing. The Tribunal is not satisfied that the applicant was incapable of making decisions or doing what was required, as an adult, and even if she was subjected to family pressure, the Tribunal does not accept that this justifies the provision of false information in the visa application. The applicant would have given such information knowingly and deliberately.
20. The Tribunal places significant weight on the applicant's Indian marriage certificate which was provided to the Department. The applicant informed the Tribunal in oral evidence it is a bogus document that has been fabricated by Mr Kamavisdar's family. There is little before the Tribunal to support this assertion and the existence of the marriage certificate is consistent with other evidencing which suggests a valid marriage between the couple. In the Tribunal's view, the existence of that document contradicts the applicant's explanation to the delegate and the Tribunal that the marriage never went ahead due to the disagreement with the families and a dispute over the dowry. In the Tribunal's view, the existence of that marriage certificate is a strong indication that the applicant is not a person of credibility and that she had deliberately falsified and withheld information about her previous marriage when dealings with the Department and her explanation to the delegate and the Tribunal.
21. The Tribunal places significant weight on the fact that in her Student visa application, the applicant not only referred to being married on the application form, she also provided a signed and attested affidavit in which she stated that she and Kamavisdar Bhushan were married under the Hindu Marriage Act and had been living together as a married couple since the marriage. That contradicts entirely the applicant's present claims to the delegate and the Tribunal that the marriage never went ahead and that the engagement broke due to a dispute over the dowry.
22. The Tribunal also places weight on the fact the applicant stated Mr Kamavisdar as an emergency contact person on her Incoming Passenger Card in 2012. The applicant claims the marriage did not go ahead and stated on the application form that the relationship ended in February 2008. If that was true, the Tribunal does not accept that she would refer to Mr

Kamavisdar as a contact person some four years later. The applicant explained to the Tribunal in her written submission that another person assisted her with completing the IPC but that does not explain why the applicant chose to provide the name of Mr Kamavisdar as the contact person. In oral evidence to the Tribunal the applicant stated that she asked for help from the security guard and because Mr Kamavisdar's name appeared in her passport, the security guard suggested she include his name, which she did and she carried his contact details in her mobile phone. In the Tribunal's view, even if the applicant was assisted by another person, presumably she was the one who decided who to nominate as an emergency contact.

23. The combination of these matters – the applicant's evidence in the Student visa application, the information in her passport and her IPC, as well as the existence of the marriage certificate – satisfy the Tribunal that Mr Kamavisdar was the spouse of the applicant.
24. The Tribunal finds that the applicant was previously married to Mr Kamavisdar. The Tribunal finds that she provided false or misleading information on the application form when stating she had a de facto relationship with Mr Kamavisdar and was never validly married. The Tribunal finds that the applicant also provided false or misleading information in her interview with the delegate of 4 June 2014 when she denied being married to Mr Kamavisdar. The Tribunal finds that such information was relevant to determining whether the applicant was the spouse of the sponsor, for the purpose of cl. 820.221 and cl. 801.221 and it was false or misleading in a material particular.
25. The Tribunal also refers to the applicant's marriage certificate. The Tribunal notes that polygamous marriages are not permitted in Australia. If the applicant was previously legally married to Mr Kamavisdar, as the Tribunal has found, for her to be married in Australia the Tribunal finds that she failed to declare the previous marriage to the Australian authorities. The Tribunal finds that the marriage certificate evidencing her Australian marriage, which the applicant submitted with her Partner application, is a bogus document within the meaning of s. 5(c) of the Act as it was obtained because of a false or misleading statement, whether or not made knowingly.
26. The Tribunal acknowledges the applicant's denials of having previously married Mr Kamavisdar. The Tribunal has formed the view that there is convincing and probative evidence of such marriage and the Tribunal has found that the applicant did marry Mr Kamavisdar, despite her denials. However, the Tribunal also notes that even if the applicant was correct and she never validly married Mr Kamavisdar, then the Tribunal would find that the applicant's passport, which refers to Mr Kamavisdar as her spouse, is a bogus document within the meaning of s. 5(c) of the Act because the reference to Mr Kamavisdar being the spouse of the applicant would be false (on the applicant's own evidence). The Tribunal does not accept the applicant's suggestion that it was an honest mistake. In the Tribunal's view, the nomination of Mr Kamavisdar as the applicant's spouse on her passport required the deliberate provision of false information to identify the spousal relationship between the applicant and Mr Kamavisdar. The applicant claims she had no control over obtaining the passport as it was arranged by an agent or a relative. As noted elsewhere, the Tribunal is not convinced that the applicant had no control over her application and the Tribunal is of the view that it was the applicant's responsibility, despite any cultural considerations, to ensure the information that she provided, or that was provided on her behalf, was correct and accurate. Thus, even if the entirety of the applicant's claims was accepted, the Tribunal would conclude that the applicant gave or caused to be given, a bogus document in relation to her application.
27. The Tribunal is mindful of the applicant's evidence to the Tribunal that she explained her situation to the delegate who granted her the temporary visa. In the Tribunal's view, that

does not alter the fact that the applicant had given, or caused to be given, information that was false or misleading or a bogus document.

28. The Tribunal finds that the applicant gave false or misleading information about her previous marriage on the application form and in her interview with the delegate and that she did so knowingly and deliberately. The Tribunal finds that the applicant obtained and provided bogus documents, including her Australian marriage certificate, to the delegate and that she did so knowingly.
29. The Tribunal finds that there is evidence that the applicant has given, or caused to be given, to the Minister or an officer, a bogus document and / or information that was false or misleading in a material particular. The Tribunal is not satisfied the applicant meets PIC 4020(1).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

30. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
31. The Tribunal is not satisfied there are compelling circumstances that affect the interests of Australia.
32. With respect to compelling or compassionate circumstances, the applicant refers to having a three year old child and she claims she must take care of the child and also of her husband. She is pregnant with another child and is due to give birth in July 2016. The applicant referred to her employment, being a member of the community and having friends in Australia and the family's plans to buy a house.
33. The Tribunal accepts that the applicant is married to an Australian citizen and that her spouse and child are Australian citizens. The Tribunal is prepared to accept for the purpose of this application that the applicant is in a genuine relationship with her spouse and the Tribunal accepts that the applicant's spouse would be adversely affected if the visa is not granted. More significantly, the Tribunal accepts that the applicant's child is an Australian citizen. The Tribunal accepts that the applicant takes care of her three year old child and the Tribunal is prepared to accept that due to work commitments and financial limitations, the applicant's husband is unable to provide full-time care to the child. The Tribunal accepts that the applicant is the primary caregiver for the child. In the Tribunal's view, that constitutes compassionate or compelling circumstances that affect the interests of the applicant's child and spouse, who are Australian citizens, that justify the granting of the visa. Therefore the Tribunal finds that the requirements of cl.4020(1) should be waived.
34. On the basis of the above, the applicant satisfies PIC 4020 for the purposes of cl.801.226.

DECISION

35. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Spouse) visa:
 - Public Interest Criterion 4020 for the purposes of cl.801.226 of Schedule 2 to the Regulations.

Kira Raif
Senior Member